No. 6998.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Tony Panzich and John Arko,
Appellants,

vs.

The United States of America,
Appellee.

APPELLANTS' OPENING BRIEF.

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The appellants, Tony Panzich and John Arko, together with Nick Jurash, Joe N. Wilson and Tony Govarko, were tried upon an indictment charging them with having unlawfully conspired, in violation of section 37 of the Federal Penal Code, to commit certain offenses against the United States, by selling and possessing large quantities of intoxicating liquor in violation of section III, Title II of the National Prohibition Act and, in furtherance of said conspiracy, with having committed certain overt acts, set forth in the indictment. [Tr. pp. 2, 3, 4.]

Nick Jurash and Tony Govarko were acquitted. Joe N. Wilson and the appellants, Tony Panzich and John

Arko, were convicted. Sentence was then imposed as follows: The defendant, Joe N. Wilson was placed on probation for a period of three years; the appellant, Tony Panzich was sentenced to imprisonment in the United States penitentiary at McNeil Island, Washington, for the term and period of two years and to pay a fine of five thousand dollars and to stand committed to the said penitentiary until said fine be paid; and the appellant, John Arko, was sentenced to imprisonment in the United States penitentiary at McNeil Island, Washington, for the term and period of two years and to pay a fine in the sum of one thousand dollars and to stand committed to the said penitentiary until said fine be paid. [Tr. pp. 17, 18.]

From the judgments and sentences so imposed, the appellants Tony Panzich and John Arko have appealed.

STATEMENT OF FACTS.

The testimony shows that Thomas Robinson, as secretary-manager of the Elks Club in Santa Monica, California, leased to the appellant, Tony Panzich, the cafe premises at 3003 Main street, in Santa Monica, which was in the Elks Building, by a written lease, together with all furniture, furnishings, dishes, silverware, linens, and cafe equipment and also a storeroom in the same building, said lease to commence on the 18th day of August, 1930, and to end on the 18th day of August, 1931, the aggregate rental being $2820.00, payable $470.00 upon the acceptance and signing of the lease and $235.00 per month in advance for each of the succeeding ten months. The testimony of Robinson also shows that the appellant, Panzich, entered into possession of the premises a few days prior to August 18, 1930, and occupied the premises

continuously until the 15th day of September, 1931, and that during this period appellant, Panzich, paid the rent for the premises to Robinson. [Tr. pp. 42, 43.] The testimony also shows that, at the time of the execution of the lease, there was no one present except Mr. Robinson and the appellant, Tony Panzich, and that no one else entered into the negotiations of the lease. [Tr. p. 44.]

The testimony further shows that at the time of the execution of this lease between the appellant, Panzich, and the Elks Lodge, the appellant Panzich delivered to Mr. Robinson, apparently as security for the faithful performance of the lease, a grant deed executed by Title Guarantee & Trust Company, conveying certain real property to John Arkovich, John Panzich and Tony Panzich, which deed has never been placed of record. [Tr. p. 44.]

S. W. Brooks, a federal prohibition agent, testified that he first visited the cafe in Santa Monica, known as Tony's Good Fellows Inn, on April 30, 1931. This was the cafe which the appellant, Panzich, had theretofore leased from the Elks Club. Brooks had three companions with him on that trip. He testified he did not know who they were, but that one of them had come into the federal prohibition office and had arranged to take him, Brooks, to the cafe and that before arriving at the premises they had met the two other parties. Brooks testified that upon entering the cafe the person who took him there introduced him to Mr. Panzich, after which Brooks and his companions, two of whom were women, were escorted to a table in a booth by the appellant, John Arko. Brooks testified [Tr. p. 22] that after Arko had escorted them to a booth and closed the curtains, he asked them what they wanted and Brooks ordered a pint of whiskey from

Arko, who returned in about two minutes with a pint of whiskey. He testified that another waiter took the order for the food. Brooks testified that he drank one glass of the whiskey and retained the other part. This bottle was introduced in evidence as Government's Exhibit No. 1. [Tr. p. 23.]

Brooks testified that, when they left the cafe, he took the bottle with him and paid the bill presented to him by the waiter, on the bottom of which was an item "B R K $2.00".

Brooks further testified that he next visited the premises on May 4th in company with prohibition agent Casey; that he and Casey were taken to a booth in the same manner by a waiter whom he identified as the defendant, Nick Jurash; that the appellant, John Arko, and the defendant, Nick Jurash, were present at the booth and that Casey ordered some liquor and that in about two minutes Arko returned with a pint of whiskey and handed it to Casey and they drank one glass of it and retained the rest; that they also ordered food that evening and received a statement, with the food itemized at the top and an item at the bottom "B R K $2.00". [Tr. p. 24.] That he later took from the cash register a number of statements upon which were items such as "B R K $2.00", "B R K $3.00", or " B R K $5.00". [Tr. p. 24.]

Brooks further testified that on May 13 he again visited the cafe with Agent Casey; that they were escorted to a booth; that a waiter took their orders for food; that Casey ordered a pint of liquor and that, after it was delivered, Casey ordered a bottle of wine, which was delivered. That he could not state who delivered the pint

of liquor on the 13th, but that Arko delivered the wine. That when they received their statement the food was itemized and there was two items "B R K $2.00" for the whiskey and "B R K $2.50" for the wine. That the bill was paid by agent Casey.

Brooks further testified that he went into the premises on May 15, accompanied by Agents Casey, Waite, Clemens, McDonald and Banta. That Casey and Waite first went into the premises and that Casey and himself went in about thirty minutes later, at which time all of the defendants and Mrs. Panzich were present. That when he and Casey entered Casey and Waite had placed the defendant, Joe N. Wilson, under arrest. That they then arrested Panzich and the other defendants upon warrants which had been previously issued. That they also had with them a search warrant, under authority of which they searched the premises and found a bottle of wine in the safe. [Tr. p. 25.] Brooks further testified that he saw Panzich in the cafe on two occasions when he was there. [Tr. p. 31.]

Prohibition Agent Casey testified that the first time he went into the cafe was on May 14, 1931, in company with Mrs. Casey and Agent Brooks. That the defendant Govarko conducted them to the booth and that Brooks was greeted by the appellant, Arko. That Govarko waited on their table and that they ordered a pint of whiskey from Govarko. That Govarko said, "All right" and walked away and that Arko then came to the booth and the order was repeated to him. That Arko then said, "All right" and that in a few minutes, he, Arko, came back to the booth with a pint of whiskey, which he delivered to them. That he, Casey, had a conversation with

Arko about the price of whiskey. That Arko said they had two grades of whiskey, one at $5.00 a pint and one at $2.00 a pint, and that he, Casey, purchased a $2.00 a pint. That he paid the amount of the bill to the waiter who served the food and that, in addition to the food, there was an item on the bill "B R K $2.00".

Casey further testified that on May 13th he visited the cafe with the same persons. That the defendant, Jurash, conducted them to a booth. That they ordered a pint of whiskey and Arko, whom they sometimes called Kelley, came to the booth. That, as Arko brought the whiskey, they ordered a quart of wine from him, which he brought. That the bill, presented by the waiter, listed the food, with its charges; it also listed $2.00 for the liquor and $2.50 for the wine, the amount of which they paid to the waiter. Casey further testified that he next went to the premises May 15th, accompanied by Mrs. Casey and Agent Waite. That Wilson conducted them to a booth and that they ordered some whiskey and that Arko came in and returned with the whiskey. That Wilson served the food. That after they were through eating he paid Wilson. That Wilson took the money out of his pocket to make change and laid the change on the table, after which Wilson was placed under arrest. That Wilson did not take the bill nor the money given him by Casey to the cash register. That when they called for the bill, as a pre-arranged signal, Mrs. Casey left the premises and the other agents entered and placed the other defendants under arrest. That in the back of the premises in a bin they found several empty bottles and cases for whiskey bottles and a pint liquor bottle practically full. [Tr. p. 35.] That the bin in which these

bottles were found was next to the rear of the outside wall of the building, but not in the building. That, in addition to the cafe, there were other things in the building, including a store or two and the Santa Monica Elks Club. [Tr. p. 39.]

The testimony of Agent Waite was practically to the same effect as that of Casey as to the visit of May 15, 1931, except that Waite was unable to identify the person whom he testified came to the booth with the pint bottle. [Tr. p. 42.]

Earl G. Bleak, the manager of the Ocean Park branch of the Security-First National Bank, testified that an account was carried in that bank under the name of Tony Panzich and that checks on the account were signed "Tony's Good Fellows Inn, by Tony Panzich," and that no one else was authorized to draw on that account. [Tr. p. 46.]

The defendant, Jurash, testified that he first met the appellant, Tony Panzich, on May 14, 1931, and was employed by Panzich to commence work in the cafe as a waiter and was instructed to report for duty the next day, which he did. That May 14 was the first day he had ever been in that cafe. [Tr. pp. 47, 48.] His testimony was corroborated by the testimony of N. B. Restovich, who testified that he took Jurash to the cafe on May 14, 1931, and introduced him to Panzich and that he knew that Jurash had not been working in that cafe prior to that time. [Tr. pp. 49, 50.] His testimony was further corroborated by Mrs. Katie Jurash, his wife, Lena Jurash, his daughter [Tr. pp. 51, 52, 53], and by John Muhn, his next-door neighbor. [Tr. pp. 53, 54.]

The defendant Wilson denied that he sold or served any whiskey or intoxicating liquors. He denied that the defendant Govarko, was employed in the cafe and testified that Govarko was present in the cafe as a customer at the time of the arrest and that he (Wilson) had waited on Govarko shortly before the arrest. That he was not personally acquainted with Govarko [Tr. pp. 54, *et seq.*] The defendant, Govarko, testified that in the month of May, 1931, he was employed by a contractor who built houses. That he had never been employed as a waiter and had never been employed at Tony's Good Fellows Inn. That on May 15, the date of the arrest, he went into the cafe and visited with two friends who were employed there as a waiter and cook, respectively. That he was not present at the cafe April 30, May 4 or May 13, 1931. [Tr. pp. 59, 60, 61.]

Govarko's testimony was corroborated by William Austin, who testified he was a general construction contractor and that the times in question the defendant, Govarko, had been employed by him. The testimony of Govarko was further corroborated by Joseph Pavolovich and by Winfield Husted, both of whom testified that they were also employed by Austin and that, at the times in question, Govarko had been so employed and was actually engaged in working for Mr. Austin with them. [Tr. pp. 63, 64.]

The appellant, Arko, testified that his true name was John Arkovich. That he was employed in Ocean Park at Tony's Good Fellows Inn as head waiter. That the defendant Jurash first went to work at the cafe on May 15, the day of the arrest. That he had never worked there before. That the defendant Govarko had never

worked in the cafe, but was present in the cafe as a customer at the time of the arrest. [Tr. pp. 65, 66.] Arko also denied that he had ever sold any liquor of any kind in the cafe. He further testified that he was not Panzich's partner, but was merely an employee in the cafe. He testified that the deed which Panzich gave to Robinson at the time of the execution of the lease was a deed to himself, Tony Panzich and John Panzich for certain real property which they had bought together six years before. [Tr. pp. 65, 66, 67.]

CONTENTIONS OF APPELLANTS.

The appellants contend:

1. That the court erred in denying the motion of the defendants for an instructed verdict of not guilty, made at the conclusion of the evidence on the part of the plaintiff and appellee and renewed at the conclusion of all of the evidence.

2. That the court erred in reading the names of each defendant separately and requiring each defendant to stand after his name was read in the presence of the witnesses for the plaintiff, which witnesses were thereafter called upon to identify the various defendants, after such procedure had been objected to by counsel for the defendants and after counsel for the defendants had informed the court that a question of identification of such defendants would thereafter arise during the course of the trial.

3. That the court erred in permitting counsel for the plaintiff to cross-examine the defendant, John Arko, with reference to his employment by the defendant, Tony Pan-

zich, at a cafe on East First street, in Los Angeles, California, and with reference to the padlocking of such cafe by the United States Government.

These contentions are based upon the assignment of errors contained at page 83 of the transcript and will be discussed separately.

ARGUMENT.

That the Court Erred in Denying the Motion of the Defendants for an Instructed Verdict of Not Guilty, Made at the Conclusion of the Evidence on the Part of the Plaintiff and Appellee and Renewed at the Conclusion of All of the Evidence.

This assignment raises the question of the sufficiency of the evidence to support the verdict of guilty as to these appellants. It must first be noted that the appellants were not charged with violating the National Prohibition Act, but were charged with conspiracy. The only evidence in this record directly connecting the appellant, Panzich, with any intoxicating liquor was the testimony of Agent Brooks to the effect that, at the time of the arrest of the defendants, he found a bottle of wine in the safe, which was opened by Panzich. [Tr. pp. 30, 31, 42.] The fact that this single bottle of wine was locked in the safe, which was apparently under the exclusive control of Panzich, negatives the idea that the bottle was kept by Panzich in furtherance of a conspiracy to sell or possess it. Rather, it would tend to indicate that Panzich had this bottle of wine for his own personal use and there is no testimony that anyone else in the cafe knew of its existence. Although there was some testimony to the effect that on one occasion a bottle

of wine had been purchased in the cafe, and had been consumed on the premises by the officers who purchased it, there is no testimony to the effect that it was wine of a similar kind or character to that found in the bottle in the cafe.

The only other liquor found at the time of the search by the officers was found in a bin outside the building next to the outside wall of the building. The best description of the location of this bin is found in the testimony of Lawrence H. McDonald. [Tr. p. 77.] His testimony in this connection is as follows: "Just on the outside of the back door, as you go out the back door there is a number of bins there, I should say four or five. They are back right against the building. I would say you have to travel four or five feet before you come to one of those bins. I made a search of those bins and Agent Casey assisted me. I recall one of the bins had—one had coal in it, and the bin next to the door had several empty bottles and empty cardboard cartons in it, and either the first or the second bin from the door, Agent Casey found a pint of whiskey in it. I was with him at the time it was found. Government's Exhibit 6 is the bottle that was found by Agent Casey. I have my initials and handwriting there as identification marks. Off the back of the kitchen there is a hallway that runs through to some storerooms in the back of the building, and then off this hallway there is another hallway that runs to the back door that opens into the auto park next door to the building." On cross-examination McDonald testified as follows:

> "Q. You say the back door of the kitchen opens into a hall? A. There is a hallway opens off the kitchen and goes to the storerooms in the back of the building.

Q. And then there is another hall back of that? A. No, there is a hall that turns off at right angles to that. To the best of my memory it's about 8 or 10 feet from the kitchen, turns at right angles and goes to the back door.

Q. And these bins were near that back door? A. Yes, sir.

Q. And also near that back door was the auto park? A. Yes, sir.

Q. Well, at least back of the back door was an open space? A. Yes.

Q. And there was an auto park there? A. Yes."

It is a significant fact that all of the bottles, which the Government witnesses testified were bought in the cafe were of one kind and that the bottle which was found in the bin in the rear of the building was of a different kind, which an examination of the exhibits themselves will disclose. It is also a significant fact that the cafe was not the only enterprise conducted in the building. In addition to the cafe, the building contained the Santa Monica Elks Club and two stores. The only other testimony tending in any way to connect the appellant, Panzich, with the sale of any liquor was that he was the proprietor of the cafe (and the appellants concede that the evidence is sufficient to show this) and that on certain bills, or statements, which were found in the cash register were "B R K" items.

There is no testimony whatever to show that any liquor was ever ordered from, sold, or delivered by or paid

for, to or in the immediate presence of the appellant, Panzich, and the testimony shows that he was present at the cafe on two occasions, only, when witnesses testified to purchasing liquor, one of which was April 30th, at the time of the first visit by Agent Brooks, and the other of which was May 15, the day of the arrest. No witness testified that he had any discussion with Panzich about the sale of liquor. Agent Brooks also testified [Tr. p. 28]: "This cafe was a completely equipped restaurant. It sold food, almost any kind of food you wanted to order. I don't know anything about the stock, the equipment was there. Any kind of food you ordered you always got and there was quite a considerable selection on the menu. As I recall, it was very good food." This testimony shows that Panzich was actually conducting a *bona fide* restaurant, not merely a place as a blind to cover sales of liquor.

Assuming, for the purpose of argument, but not conceding, that the testimony of the prohibition agents as to the purchase of liquor in the cafe from certain waiters was true, the evidence is just as consistent with the theory that these waiters were selling liquor without the knowledge or consent of the proprietor as it is with the theory that they were selling liquor to the patrons of the cafe, whom they served with food, pursuant to a conspiracy theretofore entered into between themselves and Panzich.

While it is undoubtedly true that a conspiracy or any other offense may be proved by circumstantial evidence, yet the circumstances must be such as to show beyond all reasonable doubt the guilt of the accused. The legal presumption is that the defendants are not guilty; and unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused, and where all of the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction.

Vernon v. U. S. (C. C. A.), 146 F. 121, 123, 124;
Wright v. U. S. (C. C. A.), 227 F. 855, 857;
Edwards v. U. S. (C. C. A.), 7 F. (2d) 357, 360;
Siden v. U. S. (C. C. A.), 9 F. (2d) 241, 244;
Ridenour v. U. S. (C. C. A.), 14 F. (2d) 888, 893;
Haning v. U. S., 21 F. (2d) 508, 510;
Sugarman v. U. S., 35 F. (2d) 663 (C. C. A. 9);
Connelly v. U. S., 46 Fed. (2d) 53.

Even if this court believes that there is sufficient evidence to show that Panzich aided or abetted in sales of liquor, that of itself is not sufficient to show the existence of a conspiracy.

> "The courts are not authorized to hold as a matter of law that one who aids and abets another in the commission of the offense is a conspirator."
>
> *Louie v. U. S.,* 218 Fed. 36.

In the case of *Dickerson v. United States,* 18 Fed. (2d) 887, the court said:

> "Wherever a circumstance relied on as evidence of criminal guilt is susceptible of two inferences, one of which is in favor of innocence, such circumstance is robbed of all probative value, even though from the other inference guilt may be fairly deducible. To warrant a conviction for conspiracy to violate a criminal statute, the evidence must disclose something further than participating in the offense which is the object of the conspiracy; there must be proof of the unlawful agreement, either express or implied, and participation with knowledge of the agreement. (Linde v. U. S., 13 F. (2d) 59 (C. C. A. 8th Cir.); U. S. v. Heitler *et al.* (D. C.), 274 F. 401; Stubbs v. U. S. (C. C. A. 9th Cir.), 249 F. 571, 161 C. C. A. 497; Bell v. U. S. (C. C. A. 8th Cir.), 2 F. (2d) 543; Allen v. U. S. (C. C. A.), 4 F. (2d) 688; U. S. v. Cole (D. C.), 153 F. 801, 804; Lucadamo v. U. S. (C. C. A.), 280 F. 653, 657.)
>
> The mere fact that the plaintiffs in error purchased liquor from the conspirators is not sufficient to establish their guilt as conspirators. The purchaser may be perfectly innocent of any participation in the conspiracy. The gist of the offense is the conspiracy, which is not to be confused with the acts done to effect the object of the conspiracy. (Iponmatsu Ukichi v. U. S. (C. C. A.), 281 F. 525.)"

The evidence in this case has no greater effect than to raise a mere suspicion that the appellant Panzich might have been connected with the conspiracy charged in the indictment.

II.

That the Court Erred in Reading the Names of Each Defendant Separately and Requiring Each Defendant to Stand After His Name Was Read in the Presence of the Witnessses for the Plaintiff, Which Witnesses Were Thereafter Called Upon to Identify the Various Defendants, After Such Procedure Had Been Objected to by Counsel for the Defendants and After Counsel for the Defendants Had Informed the Court That a Question of Identification of Such Defendants Would Thereafter Arise During the Course of the Trial.

At the opening of the trial the following procedure took place:

"The Clerk: United States v. Tony Panzich, Nick Jurash, Joe N. Wilson, John Arko and Tony Govarko.

Mr. Graham: The defendants are ready and are present in court.

The Court: Very well.

The Clerk: Will the defendants step forward?

Mr. Graham: But I don't want their names called, to have them step forward, because there may be a question of identity and I don't think it would be fair. I assure the court they are all here.

The Court: Well, what is the idea?

Mr. Graham: If it becomes necessary for any Government witness to point out which defendant is which defendant, I don't think they should have that done for them by the clerk before they have to do it.

The Court: Well, let the defendants take their places in the regular way, and we will decide it in the regular way when we get to it.

Mr. Graham: Those are all of the defendants and they are all present.

The Court: Proceed.

The Clerk: May I call the roll, Your Honor?

The Court: Yes.

The Clerk: This is Judge James' jury.

The Court: Yes.

(Clerk calls roll of the jury.)

The Court: Fill the box.

(Whereupon twelve jurors took their seats in the jury box.)

The Court: The case this morning, gentlemen, is an indictment against Tony Panzich. Stand, please.

Mr. Graham: If the court please, before this is done, I would like to ask if the Government witnesses are in the room?

The Court: Well, I don't know. He will stand if he is present.

(The defendant Tony Panzich arises.)

Mr. Graham: Let the record show that I object to this procedure, and note an exception.

The Court: Yes.

Nick Jurash, Joe N. Wilson, John Arko and Tony Govarko.

(The foregoing named defendants arose.)

The Court: That's sufficient. Sit down, gentlemen.

(All defendants became seated.)

The Court: Those are the defendants."

The appellants concede that there is no error in requiring a defendant to stand upon being identified by

a witness, so that the jury may see which defendant has been identified, but where, as here, there is a serious question of identification involved, the appellants respectfully contend that it is most unfair for the court to call the names of the defendants and to require each defendant to stand as his name is called, without first excluding from the court room those witnesses who will thereafter be called upon to identify the defendants as the persons whom the witnesses will say they saw on previous occasions. In other words, the appellants contend that they were deprived of a fair trial by the action of the court in first identifying the defendants individually to the officers and in permitting the officers to take the stand and identify the defendants to the jury.

The record, as hereinbefore quoted, shows that the appellants, through their counsel, made timely and proper objections and exceptions to this mode of procedure. It must be noted that it was called to the attention of the trial court that a question of identification would arise and that appellants had no objection to answering to their names in the presence of the jury but that the appellants requested the court to exclude the Government's witnesses from the court room before following this procedure. This the court refused to do.

After having the various defendants identified for them, the prohibition agents identified Jurash as a waiter who had served liquor to them on various occasions prior to May 15, 1931, and the testimony of Jurash and other witnesses clearly shows that Jurash was first employed in this cafe on May 15, 1931. That this fact was established to the satisfaction of the jury is shown by the verdict acquitting Jurash.

Also, after having had the defendant Tony Govarko identified for them by the court, the Government witnesses identified Govarko as a waiter who had sold and served them liquor on various occasions prior to May 15, 1931. The testimony also clearly shows that Govarko was never employed in the cafe and that at the times in question he was employed as a laborer by William Austin, a contractor, and was present in the cafe on the evening of May 15 only as a customer. That this fact was clearly established to the satisfaction of the jury is shown by the verdict acquitting Govarko. The testimony of these officers shows one of two things: either that their recollection of faces and events was so hazy as not to be worthy of credence, or that, on the evening of May 15, 1931, they went into the cafe in Santa Monica for the purpose of arresting Panzich and four other persons whom they might find in his cafe, without being greatly concerned over the identity of the persons who were thereafter to become Panzich's co-defendants.

In view of the peculiar identifications of Jurash and Govarko, the prejudice resulting to Arko by having the court identify him to the witnesses so that they might thereafter identify him to the jury is obvious.

In spite of a diligent search through the authorities, the appellants have been unable to find any case where a similar procedure has been followed, but the prejudice resulting from such a procedure is so apparent that the citation of authorities seems unnecessary.

III.

That the Court Erred in Permitting Counsel for the Plaintiff to Cross-Examine the Defendant, John Arko, With Reference to His Employment by the Defendant, Tony Panzich, at a Cafe on East First Street, in Los Angeles, California, and With Reference to the Padlocking of Such Cafe by the United States Government.

The appellant, John Arko, who testified that his true name was John Arkovich, also testified that he was head waiter at Tony's Good Fellows Inn at Ocean Park. That he started to work there at the time the place was opened. It was about the 17th or 18th of August, 1930. That Tony Panzich, the proprietor of the cafe, hired him to work there and that his duties were to seat people as they came in. That he didn't wait on the tables. That he was acquainted with Nick Jurash and first met him on the night of May 14th at the cafe and that Jurash was there on May 15, the date of the arrest, on which date Jurash first went to work in the cafe. That he was acquainted with Tony Govarko. That Govarko never worked in the cafe. That he saw him there on the day of the arrest. That he never sold whiskey nor served whiskey to any of the prohibition agents who had testified for the Government. That he might have seen them in the cafe, but didn't remember seeing them before he was placed under arrest. [Tr. pp. 65, 66.]

On cross-examination the United States Attorney was not only permitted, but was directed by the court, to cross-examine this appellant concerning matters which were entirely without and beyond the scope of his direct examination and to wrest from this appellant the testi-

mony that he had formerly worked for the appellant, Tony Panzich, in a cafe on First street, Los Angeles, approximately one year before the date of the offense charged in this indictment and that that cafe in Los Angeles had been padlocked and closed by Federal officers. In order that the court may see that these matters were not proper cross-examination and were highly prejudicial the entire testimony of Arko, both direct and cross, is set forth in full in an appendix to this brief.

The rule is very strict and is definitely established in the Federal courts that the party on whose behalf a witness is called has the right to restrict his cross-examination to the subjects of his direct examination and that a violation of this right is reversible.

> *Illinois Cent. R. R. Co. v. Nelson,* 212 Fed. 69;
>
> *Harrold v. Territory of Okla.,* 169 Fed. 47, 52, 94 C. C. A. 415;
>
> *Resurrection Gold Mining Co. v. Fortune Gold Mining Co.,* 129 Fed. 668, 674, 64 C. C. A. 180.

In the case of *Harrold v. Territory of Oklahoma, supra,* the court said:

> "When he (the defendant) testifies as a witness he waives this privilege of silence, and subjects himself to cross-examination and impeachment to the same extent as any other witness would subject himself thereto in the same situation, but no farther. He may be cross-examined upon the subjects of his direct examination, but not upon other subjects. * * *."

See, also:

Heard v. U. S., 255 Fed. 829, 833;

Feener v. U. S., 249 Fed. 425;

Farley v. U. S., 269 Fed. 721.

In *Beyer v. United States,* 282 Fed. 225, the indictment charged that the defendant "unlawfully, wilfully and knowingly did have in his possession for the purpose of sale and did sell a quantity of intoxicating liquor" on June 19, 1920. The defendant testified on his direct examination that he did not sell any liquor that date, June 19, 1920, and had not sold any "since the time prohibition started". Under cross-examination he testified that he had not had any liquor in his place, 139 Halsey street, Newark, New Jersey, since the first day of July, 1919, when prohibition went into effect. He was then asked by the United States Attorney if he recalled a seizure of liquor on March 10, 1920. An objection was made to the question and after some discussion, in which defendant's counsel stated that he had not asked him anything on direct examination that happened prior to June 19, 1920, the court said:

> "He (the defendant) said to the District Attorney that he had nothing there from the time prohibition went into effect and now, he is asking him about that. I think it is perfectly proper."

The defendant then answered that he might have had a bottle in his place that day for himself. On appeal, the court said:

> "Possession is a crime separate and distinct from the crime of the sale of liquor. Consequently, in the trial of the defendant for the sale of liquor in his

cafe at 139 Halsey street, Newark, on June 19, 1920, it was immaterial whether or not defendant had liquor in his possession there at some previous time. The existence or non-existence of that fact would not prove or disprove the issue on trial."

The court further said:

"Possession at some other time was irrelevant and immaterial to the issue, and the United States Attorney was bound by defendant's answer. In testifying, a defendant subjects himself to the same liabilities and is entitled to the same privileges as other witnesses. (State v. Sprague, 74 N. J. Law, 419, 425, 45 Atl. 788.)

While proof of the possession of liquor at another time was collateral and immaterial, so far as establishing the issue on trial was concerned, its effect upon the jury was detrimental and prejudicial to the defendant. Evidence that he committed other crimes at other times may not be admitted to show that he had it within his power and was likely to commit the particular crime with which he was charged. (Citing cases.) It is easy to see how such evidence might prejudice the jury, render a fair trial impossible, and lead to a conviction. We are therefore constrained to reverse this case and grant a new trial."

In *Paquin v. U. S.*, 251 Fed. 579, the defendant was charged with violations of the Harrison Drug Act. After the plaintiff had rested its case and the examination of the defendant in his own behalf was closed, the court permitted the United States Attorney to prove by him, on his cross-examination, over the objection of his counsel, that, when a United States officer stated to him that

he was about to report him and did not know whether or not he should arrest him for an offense alleged to have been committed many months after the date when those on trial were alleged to have been committed, the defendant told him that his daughter was in bed about to be confined, that he was expecting a call any minute and asked him to defer the report and arrest and offered him $50.00 if he would defer them two days.

In this case the court said:

> "The defendant had not testified in his examination in chief in any way about this alleged offer to bribe, and the questions relative thereto, propounded by the attorney for the United States, were not proper cross-examination. The receipt of this evidence and the argument upon it were clearly injurious to the defendant, and a fatal error, which compels a reversal of the judgment, and renders the discussion and decision of other alleged errors immaterial."

In *Tucker v. United States,* 5 Fed. (2d) 818, the defendants were charged with using the mails in furtherance of a scheme to defraud. One of the defendants was called as a witness in behalf of the defendants. He testified to the plan he had worked out for operating road motion picture shows, and to what he stated to prospective employees and to his good faith in the matter. He at no time in any way mentioned or referred to the advertisements or the insertion of the same in the newspaper. He made no reference to the statements concerning the advertisements testified to by the persons who called upon him in response to advertisements. In short, his direct testimony went wholly to the refutation of the

first element of the offenses charged, namely, the scheme to defraud, and at no time went to the question of using the postoffice in furtherance of any such scheme. On cross-examination he was asked if he inserted or caused the insertion of the advertisements charged in the first four counts of the indictment. Objection was interposed to the effect that such questions were outside the scope of the direct examination, were therefore improper cross-examination and, in effect, made him the Government's witness, and compelled him to be a witness against himself. In commenting upon the assignment of error predicated upon the above cross-examination, the court said:

> "By the Act of March 16, 1878, 20 Stat. 30 (Comp. St., sec. 1465), Congress provided that 'the person so charged shall, at his own request, but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him'. What is the effect of the defendant availing himself of this statute and testifying in his own behalf upon the privilege guaranteed to him by the Fifth Amendment? All courts recognize that he subjects himself to cross-examination. So far as we have been able to determine no court or legal writer has suggested that after the accused has testified in his own behalf he can be called as a witness against himself by the prosecution. If the accused testifies in his own behalf, manifestly his testimony should be subjected to the same tests for determining its truthfulness as that of any other witness. The primary purpose of cross-examination in the Federal courts is to test the truth of the testimony adduced by the direct examination and to clarify or explain the same. It is not to prove independent facts in the case of the cross-examining party.

If there is good reason why a defendant should not be compelled to be a witness against himself, there ought to be equally good reason why, if he has testified voluntarily upon one issue, he should not be compelled to testify against his will concerning matters wholly unrelated to that issue, which would not be within the scope of proper cross-examination if he were an ordinary witness.

We conclude that, when a defendant in a criminal case voluntarily becomes a witness in his own behalf, he subjects himself to cross-examination and impeachment to the same extent as any other witness in the same situation, but he does not subject himself to cross-examination and impeachment to any greater extent. (Harrold v. Territory of Oklahoma (C. C. A. 8), 169 F. 47, 94 C. C. A. 415, 17 Ann. Cas. 868; Paquin v. U. S. (C. C. A. 8), 261 F. 579, 163 C. C. A. 573; Fitzpatrick v. U. S., 178 U. S. 304, 315, 316, 20 S. Ct. 944, 44 L. Ed. 1078; Sawyer v. U. S., 202 U. S. 150, 165, 25 S. Ct. 575, 50 L. Ed. 972, 6 Ann. Cas. 269.)"

The court further said:

"The rule fixing the limitation upon the cross-examination of a witness generally in the national courts is stated in Heard v. U. S. (C. C. A.), 255 F. 829, at page 833, 167 C. C. A. 157, 161, as follows:

'The rule on this subject in the national courts is that the party in whose behalf a witness is called has the right to restrict his cross-examination to the subjects of his direct examination, and a violation of this right is reversible error. If the cross-examination would inquire of the witness concerning matters not opened on direct examination, he must call him

in his own behalf. (Philadelphia & Trenton Railway Co. v. Stimpson, 39 U. S. (14 Pet.), 448, 460, 10 L. Ed. 535; Houghton v. Jones, 1 Wall. 702, 706, 17 L. Ed. 503; Resurrection Gold Mining Co. v. Fortune Gold Mining Co., 129 Fed. 668, 674, 64 C. C. A. 180, and cases there cited; Illinois Central Railway Co. v. Nelson, 212 Fed. 69, 74, 128 C. C. A. 525; Harrold v. Territory of Oklahoma, 169 Fed. 47, 52, 94 C. C. A. 415, 17 Ann. Cas. 868.)'

See, also, Camp Mfg. Co. v. Beck (C. C. A. 4), 283 F. 705, 706.

The rule is the same in civil and criminal cases. (Greer v. U. S. (C. C. A. 8), 240 F. 320, 323, 153 C. C. A. 246.)"

In an early case from this circuit the court held that an unlimited cross-examination of defendant to show that he was a person of bad character or had committed other offenses was improper.

Allen v. U. S., 115 Fed. 3, 11.

In the case of *Haussener v. United States,* 4 Fed. (2d) 884, the court held that it was error requiring a reversal for the trial court to permit the prosecuting attorney, on cross-examination of a defendant, to question him as to his prior convictions of violations of the Volstead Act or of a violation of a city ordinance.

In *Wilson v. United States,* 4 Fed. (2d) 888, the Circuit Court reversed a conviction because the trial court permitted the defendant to be cross-examined upon matters not touched upon in her direct examination.

In the case of *Coulston v. United States,* 51 Fed. (2d) 178, the prosecuting attorney was permitted, on cross-

examination of the defendant, to inquire into a controversy between defendant and the narcotic agent, involving transactions which occurred some thirteen months after the offense for which he was on trial, although this matter had not been touched upon in the direct examination. In this connection the court said:

> "In our judgment this was prejudicial error. The issue presented was a simple one: Did defendant negotiate the sale on January 20, 1929, as testified to by two Government witnesses, or was he an innocent bystander, as he testified. These remote and disconnected transactions had no evidentiary bearing on this issue; at best they could serve but to create an atmosphere of hostility and to distract the attention of the jury from the issue.

The court further said:

> "In the civil law, and very early in the common law, evidence of other crimes was admitted on the theory that a person who has committed one crime is apt to commit another. The inferences is so slight, the unfairness to the defendant so manifest, the difficulty and delay attendant upon trying several cases at one time so great, and the confusion of the jury so likely, that for more than two hundred years it has been the rule that evidence of other crimes is not admissible. (Boyd v. United States, 142 U. S. 450, 12 S. Ct. 292, 35 L. Ed. 1077; Hall v. U. S., 150 U. S. 76, 14 S. Ct. 22, 37 L. Ed. 1003; Niederluecke v. United States (C. C. A. 8), 21 F. (2d) 511; Cucchia v. U. S. (C. C. A. 5), 17 F. (2d) 86; Smith v. United States (C. C. A. 9), 10 F. (2d) 787; Wigmore on Evidence (2nd Ed.), sec. 194.) *Corpus Juris* cites cases from forty-four American jurisdictions in support of this rule. (16 C. J. 586.)

* * * It may, however, be said that, subject to possible variants so arising, it is well settled in criminal cases in the Federal courts that cross-examination must be confined to the subjects of the direct examination (Philadelphia & Trenton R. R. Co. v. Stimpson, 39 U. S. (14 Pet.) 448, 10 L. Ed. 535; Sawyer v. U. S., 202 U. S. 150, 26 S. Ct. 575, 50 L. Ed. 972, 6 Ann. Cas. 269; McKnight v. United States (C. C. A. 6), 122 F. 926; Resurrection Gold Mining Co. v. Fortune Gold Mining Co. (C. C. A. 8), 129 F. 668; Harrold v. Oklahoma (C. C. A. 8), 169 F. 47, 17 Ann. Cas. 868; Illinois Central R. R. Co. v. Nelson (C. C. A. 8), 212 F. 69; Hendrey v. United States (C. C. A. 6), 233 F. 5; Heard v. United States (C. C. A. 8), 255 F. 829; Zoline on Fed. Crim. Law and Procedure, vol. 1, sec. 385, page 317); that the credibility of a defendant who has testified may be impeached in the same manner and to the same extent as any other witness, and no further (Raffel v. United States, 271 U. S. 494, 46 S. Ct. 566, 70 L. Ed. 1054; Fitzpatrick v. United States, 178 U. S. 304, 315, 20 S. Ct. 944, 44 L. Ed. 1078; Reagan v. United States, 157 U. S. 301, 305, 15 S. Ct. 610, 39 L. Ed. 709; Madden v. United States (C. C. A. 9), 20 F. (2d) 289; Tucker v. United States (C. C. A. 8), 5 F. (2d) 818); questions asked on cross-examination for the purposes of impeachment should be confined to acts or conduct which reflect upon his integrity or truthfulness, or so 'pertain to his personal turpitude, such as to indicate such moral depravity or degeneracy on his part as would likely render him insensible to the obligations of an oath to speak the truth.' "

In *Gideon v. United States,* 52 Fed. (2d) 427, the defendant, who was the mayor of a town, was convicted

of conspiracy to violate the National Prohibition Act. The prosecutor was permitted to cross-examine the defendant respecting defendant's appointing of improper persons as policemen. The cross-examination was permitted on the theory that it went to the credibility of the witness, but none of the matters had been gone into on the examination-in-chief of defendant. Some of them had occurred outside the period of the alleged conspiracy and had no bearing thereon.

In reversing the conviction, the court said:

> "We think too great latitude was allowed in this cross-examination of defendant. It is not permissible under the guise of testing the credibility of a defendant to question him on cross-examination about matters not touched upon in the examination-in-chief nor pertinent thereto; not tending to prove the charge upon which the defendant is being tried, but the sole tendency of which is to prejudice the defendant in the eyes of the jury. * * * We are led to the conclusion that whatever may have been the purpose of the cross-examination referred to, the effect was highly prejudicial to defendant. It had no tendency to prove the charge against him, but was calculated simply to degrade him in the eyes of the jury.
>
> In Allen v. United States (C. C. A.), 115 F. 3, page 11, the court said: 'What was the object of these improper questions? What was the motive? Was it not for the purpose of degrading the defendant before the jury? Such was evidently the effect, whether so intended or not. * * * Such an examination was irrelevant, unjust, unfair, and clearly prejudicial. * * * It was for the pur-

pose of showing that his habits were bad, * * * and to endeavor to secure his conviction upon general principles, independent of the testimony offered as to his guilt or innocence, weak or strong as it might be.'

Later on in the same opinion the court approvingly quoted from State v. Papage, 57 N. H. 245, 289, 24 Am. Rep. 69, the following language: 'It is quite inconsistent with that fairness of trial to which every man is entitled that the jury should be prejudiced against him by any evidence except what relates to the issue; above all, should it not be permitted to blacken his character, to show that he is worthless.' See, also, Paquin v. United States, 251 F. 579 (C. C. A. 8); Manning v. United States, 287 F. 800, 805 (C. C. A. 8); Newman v. United States (C. C. A.), 289 F. 712; Havener v. United States, *supra.*"

The attention of the court is respectfully invited to the fact that, in the above decision, the court quotes approvingly from the *Allen* case, *supra,* which was decided by this court.

In *Weiner v. United States,* 20 Fed. (2) 522, the court said:

"Some United States Attorneys, when prosecuting for violations of the National Prohibition Act (Comp. St., sec. 10138¼ *et seq.*), show a disposition to depart as far as they safely can from the rule which limits cross-examination of the defendant as to prior criminal convictions solely to an attack upon his credibility as a witness (when, as in this case, he has not put his character in issue) and to endeavor thus to lodge in the minds of jurors the

thought that, as the defendant has confessed a previous conviction for the commission of a similar crime, it is likely he committed the one for which he is on trial.

The law has long been settled that evidence of the commission of one crime cannot be used to prove the defendant committed another. (Wigmore on Evidence, sec. 192; Regina v. Oddy, 2 Denison Ct. C. 264; Boyd v. United States, 142 U. S. 450, 12 S. Ct. 292, 35 L. Ed. 1077; Taliaferro v. United States (C. C. A.), 213 F. 25; Dyar v. United States (C. C. A.), 186 F. 514.) To this rule there are exceptions, for instance, when two offenses are inseparably connected and evidence of the first tends directly to prove the second. (Astwood v. United States, 1 F. (2d) (C. C. A. 8th) 639, 642.) The rule against the admissibility of evidence of one crime to prove another is equally applicable whether the evidence is elicited from witnesses for the prosecution or from the defendant himself. But when the defendant takes the stand in his own defense, he offers himself as a witness and, like all witnesses, submits himself to attack as to his credibility. For this purpose alone he may be asked, and be compelled to answer, questions as to the fact of previous convictions. And in this way his testimony may lawfully be weakened. It is just here that trouble arises, for not infrequently a prosecuting attorney will, if allowed, proceed further and explore the defendant's record in an endeavor to compare the facts of two unrelated cases and prove the one on trial by the one confessed. This, we have repeatedly held, is wrong. (Beyer v. United States (C. C. A.), 282 F. 225, 227; Mansbach v. United States (C. C. A.), 11 F. (2d) 221, 224.)"

See, also:

DeSoto Motor Corp. v. Stewart, 62 Fed. 914, 917;

Weil v. United States, 2 Fed. (2d) 145.

In *People v. Mohr,* 157 Cal. 732, the court said:

> "It is elementary that a defendant on trial for a specific offense may not be discredited in the minds of the jury by evidence of specific acts in his past life not connected in any way with the matter under investigation, either offered in chief by the district attorney, or elicited on cross-examination of the defendant, unless the evidence given by him on direct examination was of such a nature as to warrant it as proper cross-examination."

The unlimited cross-examination of the witness, Arko, was clearly prejudicial, not only to himself, but to the appellant, Panzich. The question as to whether a cafe operated by Panzich and in which Arko had been employed, in a different city and at a different time, had been padlocked by the Federal officers, had no tendency to prove or disprove any of the issues in this case, was clearly prejudicial and could have been asked only for the purpose of prejudicing both appellants in the minds of the jury. As was said in the *Beyer* case, *supra,* evidence that the appellants committed other crimes, at other times, may not be admitted to show that they had it within their power and were likely to commit the particular crime with which they were charged. It is easy to see how such evidence might prejudice the jury, render a fair trial impossible, and lead to a conviction.

In this case the attention of the court is respectfully invited to the fact that Arko was called as a witness on behalf of all defendants and that, consequently, the improper and prejudicial cross-examination of him prejudiced the appellant, Panzich, as much as it did the appellant, Arko.

For the foregoing reasons the appellants contend that the judgments and sentences should be reversed.

Respectfully submitted,

RUSSELL GRAHAM,
Attorney for Appellants.

JOHN ARKOVICH,

a witness on behalf of the defendants, testified as follows:
By Mr. Graham:

My name is John Arkovich. Some people call me Kelly for nickname. My nickname is Kelly. People call me Arkovich most of the times, but some people call me Kelly. I never told anyone my name was Kelly. My business is waiter. In April and May, 1931, I was employed in Ocean Park at Tony's Goodfellows Inn. I was head waiter. I started work there at the time the place was opened. I don't exactly remember the date. It was about the 17th or 18th of August, 1930. Tony Panzich hired me to work. He was the proprietor of the cafe. My duties as head waiter was to seat the people as they came in the place.

Examination

By the Court:

My duties were to seat them. That is all I did. I didn't wait on them. I was just the head waiter, to seat people at the tables. I was not a steward. I was head waiter. Just seated the people, that is all I did there. When the customers came in looking for a table I seated them. That is all I did. Just showed people that came in to eat to the place where they could sit down. That is all I did.

Further Direct Examination.

By Mr. Graham:

I didn't wait on any of the tables at all. I am acquainted with the defendant Nick Jurash. I first met

him on the night of the 14th. I first met him at Santa Monica in the cafe. His cousin came down there with him and went over to Mr. Panzich and asked him if he could give him a job and he went to work on May 15th, the day of the arrest. He had never worked in that cafe before that. I am acquainted with Tony Govarko. He never worked in that cafe. I saw him there one time May 15th, the day of the arrest. I saw these prohibition agents who testified here yesterday. Mr. Brooks and Mr. Casey. I never sold any of those men any whiskey and I never served them with any whiskey. I don't remember seeing them in the cafe, maybe I did, I don't remember. To my knowledge, the only time I seen them was when I was placed under arrest. I don't remember that they were in the cafe before that. When people came into the cafe it was part of my duty to seat them. I seated a great many people while I was in the cafe. Sometimes four or five hundred. Every day it wasn't the same thing. These people might have been in the cafe, but I don't remember them.

Cross-Examination.

By Mr. Rowell:

I did not have more of a responsible position there than head waiter. I wasn't Mr. Panzich's partner. I did not put up part of the security for the lease. My name is John Arkovich. I am the same John Arkovich whose name is mentioned in the grant deed given to the Elks Club as security for the lease. Tony Panzich put up his own security for the lease. I am the same John Arkovich mentioned in that deed. This is a deed to me and Tony Panzich and John Panzich from the Title Guarantee and Trust Company to certain property

in the county of Los Angeles, land. Two different pieces of land, the easterly 25 feet of Lot 1 and the other is the easterly 25 feet of Lot 2, 50 feet altogether. Tony Panzich, John Panzich and I bought this land together six years ago. (In response to the question: "You and Tony Panzich were working together in another restaurant at that time, weren't you, or operating another restaurant?" the witness replied: "I was never in partnership with Tony.") I was working for him, but not as a partner. When he came to make the lease to the Elks Club building at Santa Monica, I didn't know that he was going to move down there before he made that lease. He didn't talk to me about moving to Santa Monica until he moved down there. Before he went down to Santa Monica his restaurant was on First street.

Q. Where was his restaurant before he went down to Santa Monica? A. On First street.

Q. Well, that place was closed before you moved to Santa Monica? A. I don't remember if it was or not.

Q. Well, you remember when it was padlocked?

Mr. Graham: Now, just a minute. I object to that, and assign the question as misconduct and error.

The Court: You can object all you want—

Mr. Graham: I will.

The Court: Now, Mr. Graham, don't go very much further.

Mr. Graham: I beg your pardon.

The Court: This is a legitimate inquiry made at the request of the court, as you well know, and under circumstances justifying a thorough ventilation of the actions of this witness with a scheme which are, to say the

least, a little bit suspicious at the present time, and it will go to the utmost.

Mr. Graham: I have no objection to the inquiry being pursued, but I made my assignment.

The Court: You have made your objection to it?

Mr. Graham: Yes.

The Court: The court is ready to rule.

Mr. Graham: I also wish to ask the court to instruct the jury to disregard the question.

The Court: Well, your request is denied. Overruled. Go on.

Mr. Graham: Exception.

The Court: Go on.

Mr. Rowell: Q. Do you remember when the padlock was placed on that place on First street? A. I don't remember the date.

Q. You remember that it happened, however? A. I don't remember to my knowledge.

Q. You were working for Tony Panzich at the time it was padlocked, weren't you? A. I was working for him. I don't know, when was it padlocked?

The Court: Do you say you don't know whether—

The Witness: When was it padlocked?

The Court: Q. You say you don't know whether it was padlocked or not. Is that correct? A. I don't remember when.

Q. You don't remember when what? A. I don't remember when he was out of the place on First street.

Q. Do you remember or don't you remember whether the place ran by Tony Panzich was padlocked? A. The place it was closed. I don't remember if it was padlocked or not.

Q. Well, it was closed by the Government officers, wasn't it? A. I don't remember.

Q. You don't know if it was closed by the Government officers or not? A. No.

Mr. Rowell: Q. You were working there at the time it was done? A. I was working before.

Q. And you knew that they had started proceedings to try and close it up? A. I knew the place was closed, but I didn't know who closed it.

Q. Don't you remember testifying here in the proceedings to try and close it up? A. No.

Q. Weren't you here with Tony Panzich on that day? A. No, sir, I was not.

Q. How long have you been with Mr. Panzich? A. Oh, I have been with him more than 10 years.

Q. Where did he have a restaurant when you first went to work for him? A. On First street.

Q. Were you ever in the Summit avenue place? A. Yes, I was down there to his house once in a while.

Q. Well, he had a restaurant there on Summit avenue, didn't he? A. No, he didn't.

Q. Did you move from the First street place directly to Santa Monica? A. Tony moved down there and opened the place and gave me a job.

Q. Well, you remember when they quit business on First street, don't you? A. Yes.

Q. And you remember when you opened the place in Santa Monica? I don't mean the exact date. I mean about the time you opened the place down there? A. I didn't open it myself.

Q. You know when the place was opened at Santa Monica, don't you? A. Yes.

Q. All right, and you remember when the place was closed on First street, when you quit work on First street? A. I don't remember the date.

Q. You don't remember the date, but you remember you did quit work there?

Mr. Graham: I object on the ground that it is not proper cross-examination.

The Court: Overruled.

Mr. Graham: Exception.

The Court: Mr. Reporter, read that question.

(Question read.)

A. I don't remember when that place was closed.

Q. By Mr. Rowell: You know that it was closed, don't you? A. Yes.

Q. And you quit work down there? A. Yes.

I also went to work down at Santa Monica. I imagine it was about three months between the time I quit work on First street and the time I started working at Santa Monica. I am not positively sure. During that three months I was not working for Tony. I did not see him very many times during that time. I was not with him when he wrote that lease up with the Elks lodge on this place at Santa Monica. He said: "I am going to assign my share of the lease" for the place down at Santa Monica. Panzich told me, "I am figuring to open a restraurant," and asked me if I wanted to work for him.

Q. When he asked you if you wanted to work for him down there didn't he tell you he was going to put this land you had a third interest in for security? A. Yes, to assign his share of the lease.

Q. Did you not assign your share? A. I did not.

Q. Have you any interest in this land now? A. Yes.

Q. And have you any papers to show your interest was not included in this paper or deed that was given to them.

Mr. Graham: Objected to, not proper cross-examination.

The Court: Overruled.

Mr. Graham: Exception, and objected to on the further ground it assumes facts not in evidence; no evidence of the interest of anyone in that property.

The Court: Overruled.

Mr. Graham: Exception.

Mr. Rowell: Q. Did you ever get a statement from the Elks Club that they weren't holding your portion of this property as security for the lease? A. No, sir.

Mr. Graham: Same objection.

The Court: Overruled.

Mr. Graham: Exception.

Tony Govarko was not in that restraurant on the 30th of April, 1931, employed as a waiter. He was not there on April 30th. I know that. He was not there on May 4th. I know that. I am sure he was not there on the 13th of May, 1931. I am sure of that. I don't remember those dates, but I never seen him there but one time and that was on May 15th. He was there about 4:30 or 5:00 o'clock when I first seen him. I went to work at two o'clock in the afternoon. He wasn't there until 4:30 or 5:00 o'clock. He came in about 4:30 or 5:00 o'clock. I saw him come in, but he didn't come in with anybody. Nick Jurash was not there on the 30th of April, 1931. I am sure of that. I am sure he

was not there on May 4th. He was not there on May 13th, 1931. The first time Nick Jurash was ever there was on the 14th of May. The only conversation I ever had with Mr. Brooks was when he placed me under arrest. He asked me what my name was. I didn't see him there on the 30th of April, on the 4th of May or the 13th of May. I am sure of that. It is not a fact that on the 30th of April, 1931, in the evening that I delivered to Mr. Brooks one pint of whiskey (Government's Exhibit 1 in this case.) It is not a fact that I delivered to Agent Brooks and Agent Casey a pint of whiskey on the 4th of May, 1931. It is not a fact that I served to Agent Brooks and Agent Casey while they were eating their dinner on the night of May 13, 1931, a bottle of wine. It is not a fact that I delivered to them another pint of whiskey on that same day.

Redirect Examination.

By Mr. Graham:

I did not sign any documents relating to the lease that Mr. Panzich had on that cafe. [Tr. pp. 65-73, inc.]